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April 15, 1999

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Chairman Melvin Malone
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0500


Re: *Complaint of AVR of Tennessee, LP d/b/a Hyperion of Tennessee, LP
Against BellSouth Telecommunications, Inc. to Enforce Reciprocal
Compensation and "Most Favored Nation" Provisions of the Parties'
Interconnection Agreement*
Docket No. 98-00530

Dear Chairman Malone:

I have enclosed one original and thirteen copies of the rebuttal testimony of David Martin on behalf of AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. in the above-captioned proceeding.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 
Henry Walker

HW/nl
Enclosure
c: Parties

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee**

**IN RE: COMPLAINT OF AVR OF TENNESSEE, L.P. D/B/A HYPERION OF
TENNESSEE, L.P. AGAINST BELL SOUTH TELECOMMUNICATIONS,
INC. TO ENFORCE RECIPROCAL COMPENSATION AND "MOST
FAVORED NATION" PROVISION OF THE PARTIES'
INTERCONNECTION AGREEMENT**

Docket No. 98-00530

**REBUTTAL TESTIMONY OF DAVID MARTIN
ON BEHALF OF
AVR OF TENNESSEE, L.P. D/B/A HYPERION OF TENNESSEE, L.P.**

1 **Q. ARE YOU THE SAME DAVID MARTIN WHO PROVIDED DIRECT TESTIMONY**
2 **IN THIS CASE?**

3 **A. Yes, I am.**

4 **Q. HAVE YOU REVIEWED THE TESTIMONY FILED BY BELL SOUTH?**

5 **A. Yes, I have.**

6 **Q. DO YOU AGREE WITH THE TESTIMONY FILED?**

7 **A. I disagree with virtually everything in the testimony filed by Messrs. Hendrix and Halprin.**
8 First, much of their testimony appears to me to be the types of argument and opinions that
9 I would expect BellSouth to make in its briefs. It was difficult to separate the "facts" from
10 the "argument."

11 **Q. PLEASE COMMENT ON MR. HENDRIX'S VIEW THAT A CALL TO AN ISP**
12 **DOES NOT TERMINATE AT THE ISP.**

13 **A. As I read his testimony, Mr. Hendrix is confusing the notion of "termination" for the**
14 purposes of determining the jurisdiction of a call with the concept of "termination" as it

1 relates to the regulatory treatment of that call. Mr. Hendrix seems to argue that a call must
2 physically terminate at the ISP in order for that call to be considered local traffic that is
3 eligible for reciprocal compensation.

4 While I am not a lawyer, it is my view that Mr. Hendrix's argument was rejected by
5 the FCC in its recent opinion addressing reciprocal compensation for ISP traffic. As I read
6 that decision, the FCC concluded that a call to an ISP was treated as terminating at the ISP
7 for regulatory purposes, including reciprocal compensation, even if it was not viewed as
8 terminating at the ISP for jurisdictional purposes.

9 For example, BellSouth can not dispute that Hyperion delivers the call from the
10 BellSouth originating end-user to the telephone exchange service of the ISP bearing the
11 called telephone number and when the call reaches the ISP, it is "answered" and answer
12 supervision is returned. By long-established industry practice, the call is considered to have
13 been terminated at the ISP and the FCC's jurisdictional determination does not change this
14 result.

15 **Q. DO YOU AGREE WITH MR. HENDRIX'S UNDERSTANDING OF HOW**
16 **SECTION XIX OF THE HYPERION/BELLSOUTH AGREEMENT, THE "MOST**
17 **FAVORED NATION" PROVISION OPERATES?**

18 **A.** Not at all. Mr. Hendrix states that it only permits Hyperion "to 'add' new network elements
19 or services or to "substitute" more favorable rates, terms, and conditions. Here there is
20 nothing to 'add' because the existing Agreement covers the termination of local traffic, and
21 nothing to 'substitute' because the existing Agreement does not contain a termination rate."
22 (Hendrix Testimony at 5).

1 This view is totally at odds with the language of the Agreement itself and is
2 fundamentally absurd. First, the language of the Agreement is straightforward, stating:

3 In the event that BellSouth, either before or after the effective date
4 of this Agreement, enters into an agreement with any other
5 telecommunications carrier . . . which provides for any of the
6 arrangements covered by this Agreement upon rates, terms or
7 conditions that differ in any material respect from the rates, terms
8 and conditions for such arrangements set forth in this Agreement
9 ("Other Terms"), then BellSouth shall be deemed thereby to have
10 offered such arrangements to Hyperion upon such Other Terms,
11 which Hyperion may accept as provided in Section XIX.E.
12

13 There is nothing in this language about "adding" or "substituting." It simply says, as I understand
14 it, that if BellSouth enters into any other agreement containing rates, terms or conditions that are
15 materially different from those in the Hyperion Agreement, then BellSouth will have been deemed
16 to offer those terms to Hyperion. That is all it says. In this case, there was such an agreement--the
17 KMC Agreement -- and Hyperion accepted BellSouth's deemed offer.

18 Moreover, to suggest that "there is nothing to 'add' . . . and nothing to 'substitute'" is
19 ludicrous and twists the English language beyond all recognizable form. Of course one can 'add'
20 or 'substitute' a reciprocal compensation arrangement and a rate to govern those arrangements where
21 there was neither an arrangement nor a rate before.

22 **Q. PLEASE COMMENT ON MR. HENDRIX'S DISCUSSION ON THE NATURE OF**
23 **ISP TRAFFIC.**

24 **A.** It is an interesting discussion, but it is not at all relevant to the issue of whether reciprocal
25 compensation is owed for local exchange traffic originated by a customer of BellSouth and
26 delivered to Hyperion's ISP customer. Once the call reaches the called party, in this case the

1 ISP, it is treated as terminated for regulatory and compensation purposes. The services the
2 ISP provides and how it provides them are irrelevant to the issues in this case.

3 **Q. WHAT IS RELEVANT TO THIS DISPUTE?**

4 **A.** What is relevant is the service that Hyperion provides for BellSouth's customers, and the
5 obligation of BellSouth to pay Hyperion for that service.

6 **Q. WHAT IS THE SERVICE THAT HYPERION PROVIDES FOR BELL SOUTH AND**
7 **BELL SOUTH'S CUSTOMERS?**

8 **A.** Hyperion takes traffic from a BellSouth end user and transports and terminates that traffic,
9 permitting the BellSouth end user to place a local call to its Hyperion-served ISP.
10 Hyperion's facilities are used by BellSouth's customers for as long as BellSouth's customers
11 remain connected to an ISP. If Hyperion were not providing this service, BellSouth, or
12 someone else, would have to transport and terminate this local exchange traffic between its
13 customer and an ISP. The payment of reciprocal compensation between carriers reflects the
14 fact that the originating carrier is making use of the terminating carrier's facilities rather than
15 having to invest in and provide those facilities itself.

16 **Q. PLEASE COMMENT ON MR. HENDRIX'S TESTIMONY THAT BELL SOUTH DID**
17 **NOT CONSIDER ISP TRAFFIC TO BE LOCAL AT THE TIME IT ENTERED THE**
18 **AGREEMENT WITH HYPERION.**

19 **A.** I believe that it is just BellSouth's way of trying to impose unilaterally a different meaning
20 than the one shared by the parties at the time the contract was signed just because it now
21 doesn't like the deal that it struck. I also believe that his "testimony" as to what BellSouth
22 "intended" is contradicted by every piece of credible evidence. I already have testified as to
23 BellSouth's long-standing treatment of calls to ISPs as local in all other respects for the

1 decade preceding the execution of the Hyperion Agreement, and will not repeat that here.
2 Equally important, by the time this agreement was signed, it is my understanding that several
3 state commissions already had ruled that calls to ISPs were local for purposes of reciprocal
4 compensation—notably, Arizona, Colorado, Minnesota, Oregon and Washington. Certainly,
5 BellSouth was aware of these decisions and yet it never once mentioned the issue in any of
6 our discussions.

7 With all due respect for Mr. Hendrix and BellSouth, I believe that given the
8 prevailing local treatment given to ISP traffic by the entire industry at the time the
9 Hyperion Agreement was signed, and BellSouth's knowledge of that industry custom and
10 usage, it was essential for BellSouth specifically to exclude calls to ISPs from the definition
11 of local traffic subject to the payment of reciprocal compensation. It did not do so and I
12 believe that is more indicative of BellSouth's "intent" than Mr. Hendrix's present
13 rationalizations.

14 **Q. PLEASE COMMENT ON MR. HENDRIX'S "ECONOMIC SENSE" THEORY.**

15 **A.** His argument makes no sense because it is predicated on several faulty assumptions.

16 **Q. PLEASE EXPLAIN.**

17 **A.** First, he says that traffic to ISPs "will always be one-way, not two-way, as intended by the
18 Act." (Hendrix Testimony at 13). As I understand it, the notion of reciprocal compensation
19 embodied in the Telecom Act does not require that there be a balance of incoming to
20 outgoing calls for any one end-user. Rather, it only means that the carriers will pay each
21 other for exchanging and terminating all types of traffic.

22 Second, his calculation of the amount of reciprocal compensation BellSouth would
23 have to pay is faulty. His assumption of a customer being connected to the Internet for an

1 average of 2 hours per day, every day, month-in and month-out (Testimony at 14) is flatly
2 contradicted by his statement on the very next page that the total amount paid by incumbent
3 exchange carriers is based on "an average Internet usage of 6.5 hours per week." (Testimony
4 at 15). By my calculation, 6.5 hours per week is approximately 55.7 minutes per day, which
5 I will round to 56 minute per day. Using this calculation ($\$.009 \times 56 \text{ min.} \times 30 \text{ days}$) yields
6 an alleged payment of only \$15.12 per month, a vastly different amount than the scenario
7 painted by Mr. Hendrix.

8 At the same time, his assumptions fail to take into account the additional revenue that
9 BellSouth collects from its customers for their second and third lines, the costs that
10 BellSouth "avoids" by using Hyperion's network to complete calls, and the substantial
11 revenue that is generated by many other enhanced services BellSouth provides – such as
12 voice-mail, call waiting, call forwarding and caller ID – that are such ubiquitous aspects of
13 communications life today and are extremely profitable services for BellSouth.

14 **Q. IS THERE ANY ASPECT OF MR. HALPRIN'S TESTIMONY THAT YOU WOULD**
15 **LIKE TO ADDRESS?**

16 **A.** Yes, like Mr. Hendrix, Mr. Halprin appears to make many sweeping propositions of law,
17 some of which seem quite pointedly designed to attack the FCC's recent decision. I would
18 like to limit my comments to Mr. Halprin's improper suggestions – made more than once –
19 that Hyperion essentially gives away service to ISPs in order to benefit from reciprocal
20 compensation. I can state categorically that Hyperion's operations in Tennessee do not
21 "serve ISPs for little or no charge" (Halprin Testimony at 7), nor does Hyperion "serve as the
22 local exchange carrier for ISPs at uneconomic rates . . . simply to benefit from reciprocal
23 compensation inflows." (Halprin Testimony at 29). Hyperion provides services to ISPs out

1 of its local tariffs at the same rates it charges other businesses and it offers the same volume
2 discounts to all business, ISPs and non-ISPs alike. It is, in my opinion, entirely inappropriate
3 for BellSouth to make these unfounded allegations.

4 Hyperion is a new entrant in the local exchange market. It has a business plan that
5 calls for establishing facilities based networks in selected areas and then expanding those
6 networks to serve as many customers as possible. One of the most difficult tasks for any new
7 entrant is to convince an existing BellSouth customer to change phone companies. As such,
8 Hyperion has targeted new businesses, some of which happen to be ISPs. Indeed, in
9 Tennessee, Hyperion has more business lines to non-ISPs than it has to ISPs. Here, too, it
10 is entirely inappropriate for BellSouth to malign Hyperion simply because it has been more
11 successful at marketing local exchange services to ISPs than BellSouth.

12 For example, MCI, now one of the largest telecommunications companies in the
13 world, had its own inauspicious beginnings in a unique niche: it started out as a
14 point-to-point microwave carrier. It did not remain in that niche, though, and neither will
15 Hyperion.

16 **Q. IN LIGHT OF THE TESTIMONY PRESENTED, WHAT ACTION SHOULD THE**
17 **AUTHORITY TAKE?**

18 A. Hyperion asks the Authority to enter an order declaring that the traffic exchange
19 provisions of the Hyperion Agreement are fully applicable to local exchange calls that
20 terminate to ISP customers, directing BellSouth to amend the Hyperion Agreement as
21 requested, with that amendment retroactive to March 13, 1998, and directing BellSouth
22 to pay Hyperion for reciprocal compensation on a per-minute-of-use basis, together with

interest thereon, as provided under Sections IV.C and XIX.F of the Hyperion Agreement from the effective date of the amendment and in the future.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Possibly. Hyperion is continuing to search for documents responsive to requests made by BellSouth. If we discover any relevant items, I may ask the Authority for permission to file supplemental testimony to address those documents.

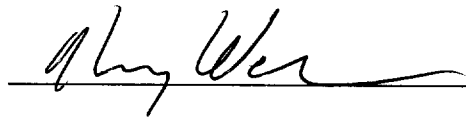
CERTIFICATE OF SERVICE

I hereby certify that on April 15, 1999, a copy of the foregoing document was served on the parties of record listed below via U. S. First Class Mail or Hand Delivery.

Richard Collier, Esquire
Tennessee Regulatory Authority
460 James Robertson Parkway
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Guy M. Hicks
333 Commerce Street
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William J. Ellenberg
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A handwritten signature in black ink, appearing to read "Guy M. Hicks", is written over a horizontal line.